

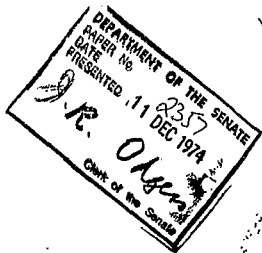


AUSTRALIAN SENATE

**Standing Committee on
Regulations and Ordinances**

Fiftieth Report

General Report 1974



THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTIETH REPORT

GENERAL REPORT 1974

MEMBERS OF THE COMMITTEE

Senator D.M. Devitt (Chairman)

Senator W.W.C. Brown

Senator J.N. Button

Senator M.G. Everett, Q.C.

Senator A.G.E. Lawrie¹

Senator A.J. Missen²

Senator D.B. Scott³

Senator I.A.C. Wood

Senator the Hon. R.C. Wright⁴

1 Appointed 24 September 1974

2 Appointed 16 October 1974

3 Discharged 24 September 1974

4 Discharged 16 October 1974

Function of the Committee Since 1932, when the Committee was first established, the principle has been followed that the function of the Committee is to scrutinise regulations and ordinances to ascertain -

- (a) that they are in accordance with the statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FIFTIETH REPORT

GENERAL REPORT FOR 1974

The Standing Committee on Regulations and Ordinances has the honour to present its Fiftieth Report to the Senate.

2 The purpose of this Report is to acquaint the Senate with the work of the Committee since its last general report (Forty-seventh Report), which was presented in November 1973. This Report deals briefly with questions arising in relation to some regulations and ordinances considered by the Committee over that period.

3 As in previous years, only a small fraction of the Committee's work has been indicated by motions for disallowance in the Senate. A large number of regulations and ordinances have been repealed or amended as a result of the Committee's scrutiny. In its Forty-seventh Report the Committee assured the Senate that in accepting undertakings by responsible ministers to repeal or amend regulations and ordinances the Committee does not compromise its independence. The Committee repeats that assurance and informs the Senate that every undertaking by a minister to repeal or amend regulations or ordinances is kept under review to ensure that the undertaking is carried out. The Committee records its appreciation of the cooperation extended to the Committee by responsible ministers.

4 The appendix to this report is a paper on the work of the Committee presented to the Second Australasian Parliamentary Seminar. The Committee considers that there is value in making this paper more widely available.

STATUTORY RULES

Statutory Rules 1973 No. 238
Papua New Guinea (Staffing Assistance) (Terms
and Conditions of Employment) Regulations

5 These regulations prescribe the terms and conditions of employment of Australian officers employed in Papua New Guinea under the Papua New Guinea (Staffing Assistance) Act 1973. The Committee was concerned with certain provisions of the regulations, as follows:

regulation 6: the absence of any specification of the persons to whom the Chief Officer is empowered to delegate his powers and functions;

regulation 9: the absence of a right of appeal for an employee who disputes a debt in respect of which a deduction is made from his salary;

regulation 42: the payment of an employee's costs in an appeal appears to depend upon the discretion of the Chief Officer;

regulation 45: the absence of a right of appeal in relation to disciplinary action against an employee who is convicted of a criminal offence; and

regulation 46: the absence of a right of appeal in relation to the summary dismissal of an employee who is accused of taking part in a strike and related offences.

6 The Prime Minister, while Acting Minister for Foreign Affairs in March 1974, gave an undertaking that the regulations would be amended so as to meet the matters raised by the Committee in relation to regulations 6, 9 and 42, while regulations 45 and 46 would be reviewed. The Committee accepted that undertaking.

7 The Committee was also concerned with regulation 24, which prohibits the holding of shares or the acquisition of land by employees without the consent of the Chief Officer. While this is a considerable restriction upon the civil rights of employees, the Committee considered that in view of the peculiar circumstances in Papua New Guinea, objection should not be taken to the provision.

Statutory Rules 1973 No. 239
Papua New Guinea (Staffing Assistance)
(Superannuation) Regulations

8 These regulations provide superannuation benefits for Australian officers employed in Papua New Guinea under the Papua New Guinea (Staffing Assistance) Act 1973. The attention of the Committee was drawn to a number of aspects of the regulations by a submission from an Australian officer. With the exception of two matters relating to the rights of pensioners under the regulations, the Committee determined that the matters raised by the submission were questions of policy with which the Committee would not be concerned.

- 9 The two matters relating to the rights of pensioners were the discretion of the Australian Government Actuary in determining pension rates, and the effect of lump-sum payments upon the ability of the superannuation fund to meet its pension commitments. The Committee considers, however, that the right of appeal to the High Court and the guarantee of the fund contained in sections 35 and 54 of the Papua New Guinea (Staffing Assistance) Act provide adequate safeguards of the rights of pensioners in relation to these matters.

Statutory Rules 1974 No. 151
Apple and Pear (Conditions of Export) Regulations

- 10 These regulations prohibit the export of fruit except in accordance with licences and permits issued by the Apple and Pear Corporation, and no remedy is provided against the refusal to issue or the revocation of licences and permits. Similar provisions have applied for many years to the export of other primary products.

- 11 The Committee has been assured that the administration of these provisions is such that they are accepted by the exporters, revocations of licences or permits are very infrequent, and that consideration will be given to providing a right of appeal on the part of exporters in the context of proposals for administrative review procedures. The Committee accepts these assurances.

Statutory Rules 1974 No. 171
Amendments of the Conciliation and Arbitration Regulations

- 12 These regulations provide that in relation to a prosecution for an offence under the Trade Practices Act, an information, warrant or other process shall suffice if the offence is set out, as nearly as may be, in the words of that Act.
- 13 The Committee appreciates that this type of provision is not uncommon in Commonwealth legislation, and occurs, for example, in the Customs Act and the Income Tax Assessment Act. The Committee considers, however, that this provision unduly trespasses upon individual rights and liberties in that an accused person may be prevented from knowing, until the hearing, exactly what wrongful act is alleged and the details of the charge. The well-recognised right of an accused to the particulars of a charge may effectively be negated by the provision. This consideration

is reinforced by the importance of the matters dealt with by the Trade Practices Act, the very general terms of the offences provisions of the Act, and the likelihood of a large number of prosecutions.

- 14 The Attorney-General has agreed with the Committee's contention and has undertaken to amend the regulations so as to ensure that accused persons are given particulars of charges. The Committee accepts that undertaking.

Statutory Rules 1974 No. 179
Student Assistance Regulations

- 15 These regulations provide for scholarships and other assistance to be granted to students under the Student Assistance Act 1973.

- 16 Part V of the Act provides for a right of appeal against a decision of an authorized person in relation to the suspension or revocation of assistance. The regulations, however, provide that assistance is suspended or revoked when certain circumstances arise, without any decision of an authorized officer. It appeared to the Committee that the self-executing nature of the regulations could negate the right of appeal contemplated by the Act.

- 17 The Minister for Education has given an undertaking that the regulations will be amended so as to make it clear that assistance is suspended or revoked upon the decision of an authorized officer and that suspensions and revocations of assistance are thereby subject to the appeal provided by the Act. The Committee accepts that assurance.

Statutory Rules 1974 No. 180
Amendments of the Commonwealth Scholarships
and Awards Regulations

- 18 These regulations were made in October 1974 under the Education Act 1945-1973. They were retrospective to 1 January 1974 and were in force for only a few days before they ceased to have effect upon the coming into effect of the Student Assistance Act 1973.

- 19 This unusual situation has been explained by officers of the Department of Education as having arisen

from a further and unexpected delay in the preparation of the regulations which were originally intended to be made under the Scholarships Act 1969, and which have now been made under the Student Assistance Act. The Committee has already observed, in its Forty-fourth Report, how the delay in drafting these regulations resulted in the Scholarships Act 1969, which was intended by the Parliament to replace the Education Act, never coming into effect.

Superannuation (Prescribed Rates of Interest) Regulations

20 These regulations prescribe the rate of interest payable on contributions made by certain members of the Public Service to the provident fund under the Superannuation Act. Late in 1973 the Committee observed that the rate of interest being prescribed by the regulations was several years behind time, and as a result provident fund contributors who left the Public Service were being disadvantaged, in that they were paid interest on their compulsory contributions at a rate which was out of date. This delay was due to difficulties in completing accrual accounts for the superannuation fund, upon which the prescribed rate of interest depended.

21 This problem was drawn to the attention of the Treasurer, who has now taken action which has resulted in the prescribed rate of interest being altered more expeditiously.

Defence Force Financial Regulations

22 In its 42nd Report the Committee observed that regulations providing for changes in Services pay and allowances were still being made with long periods of retrospectivity. The Committee found that this was due to administrative delays in the responsible departments, and the unnecessarily complicated and cumbersome method of determining changes in pay and allowances. In its 47th Report the Committee noted that while there had been some improvement in this area, regulations occasionally appeared with periods of retrospectivity in excess of one year. The Minister for Defence assured the Committee that steps were being taken to improve the system of pay determination and to minimise administrative delays, and to consolidate the relevant regulations.

- 23 The Committee now reports that there has been a further improvement and that Defence Force financial regulations with long periods of retrospectivity are now of relatively infrequent occurrence.

TERRITORY LEGISLATION

A.C.T. Ordinance 1973 No. 56
Pyramid Selling Ordinance

- 24 This Ordinance contained a provision to the effect that where a company is convicted of an offence against the Ordinance, each director of that company is deemed to be guilty of an offence unless he proves that he did not know of the offence or took all reasonable steps to prevent it. The Committee has objected to such provisions in the past, and has caused them to be amended so as to make the onus of proof placed upon the defendant less burdensome by the deletion of the word "all" in the phrase "all reasonable steps". The Minister for the Capital Territory agreed to amend this Ordinance in the same way. The Committee accepted this undertaking, which has now been carried out.

A.C.T. Ordinance 1974 No. 3
Seaweed Protection Ordinance

- 25 This Ordinance provides that it is an offence to be in possession of seaweed in the Jervis Bay Territory, and a very heavy penalty is attached to that offence. The Committee accepted the contention of the Minister for the Capital Territory that the Ordinance is necessary to prevent the large-scale commercial harvesting of a special species of seaweed in the waters of the Territory. The Committee was concerned, however, that the Ordinance could apply to any person who casually picked up seaweed and thereby committed the offence of being in possession of seaweed.
- 26 The Minister gave an undertaking that he would amend the ordinance so that it would apply only to the particular species of seaweed which it is desired to protect from commercial exploitation, and so as to make it clear that it is intended to apply only to large-scale harvesting for commercial purposes. The Committee accepted that undertaking, which has now been carried out.

A.C.T. Ordinance 1974 No. 4
Motor Traffic Ordinance

- 27 This Ordinance places restrictions upon the use of certain streets by heavy vehicles in the interests of safety and to prevent disturbance of residents, but provides that Government vehicles are exempt from those restrictions. While accepting that certain Government vehicles may need the exemption to provide particular services, it seem improper to the Committee that a general exemption should be given to all Government vehicles. The Minister has given an assurance that all departments will issue instructions to ensure that there is no misuse of the exemption. The Committee accepted this assurance.

A.C.T. Ordinance 1974 No. 18
Unclaimed Moneys Ordinance

- 28 This Ordinance contained a provision empowering the responsible minister (the Treasurer) to delegate his powers and functions under the Ordinance. The Committee considers that in provisions of this type there ought to be some specification of the class of persons to whom the delegation may be made. The Treasurer has agreed to amend this Ordinance so as to restrict the delegation to permanent officers of the Public Service.

A.C.T. Regulations 1974 No. 15
Legislative Assembly (Election) Regulations

- 29 These regulations make provision for the registration of political parties for the purpose of placing party names on ballot papers for elections to the A.C.T. Legislative Assembly. The regulations confer upon the Chief Electoral Officer wide powers to refuse or cancel registration on certain general grounds, including the ground that a name is "misleading as to the nature or objects of the party or in any other manner". The Committee considers that these powers are unobjectionable because of the limited purpose of registration. Should the existing register of parties be used for other purposes which might affect the rights of parties, however, there ought to be a right of appeal to a court against a refusal to register a party or cancellation of registration.

Christmas Island Ordinance 1973 No. 5
Importation of Dogs and Cats Ordinance

- 30 This Ordinance empowered a police officer to seize and destroy animals and goods which he considered to be prohibited imports. Upon objection being taken by the Committee to this power, the Ordinance was amended so that the forfeiture and destruction of animals or goods will depend upon the order of a court.

NOTICES OF MOTION FOR DISALLOWANCE OF REGULATIONS
AND ORDINANCES NOT DISPOSED OF WHEN THE HOUSE
OF REPRESENTATIVES IS DISSOLVED

- 31 The Acts Interpretation Act provides in section 48 sub-section (5A.) that where a notice of motion for the disallowance of regulations has not been disposed of at the end of a session of the Parliament, the regulations in question are deemed to be laid before the relevant House on the first sitting day of the next Session. Similar provisions apply to the ordinances and regulations of territories which are subject to disallowance.
- 32 This provision operates in relation to the Senate only where the Parliament is prorogued or the Senate is dissolved. The Act takes no account of the termination of a Session by the dissolution of the House of Representatives without a prorogation. The status of a notice of motion for disallowance which remains on the Senate Notice Paper when the House of Representatives is dissolved is therefore not clear. It has been presumed that the fifteen sitting days within which such a notice of motion must be disposed of, in accordance with section 48(5.) of the Act, continue to run from the time when the notice of motion was given, notwithstanding the termination of the Session by the dissolution of the House of Representatives. At the beginning of the Session of 1973-74, a notice of motion given in the last period of sittings of 1972 was dealt with on this presumption.
- 33 It is suggested that the doubt surrounding this matter, which impinges upon the rights of the Senate, be removed either by an amendment of the Acts Interpretation Act and other relevant Acts, or by the Government adopting the former practice of proroguing the Parliament before a dissolution of the House of Representatives.

PREVIOUS REPORTS

- 34 The following paragraphs indicate the action taken by the responsible ministers in relation to regulations and ordinances in respect of which the Committee has made a recommendation for disallowance since its last general report.

A.C.T. Landlord and Tenant Ordinance
(46th Report)

- 35 The amendment of this Ordinance contained in A.C.T. Ordinance No. 33 of 1973 prohibited the sale of goodwill of business premises without the consent of the Rent Controller of the Territory, without stating any criteria or grounds for the Rent Controller's decision, and without any right of appeal. The Committee considered that the Ordinance gave to an official an arbitrary power to prohibit the sale of an item of personal property.

- 36 The amendment made by the Ordinance was repealed by A.C.T. Ordinance No. 51 of 1973, in accordance with the undertaking given by the Minister for the Capital Territory.

Public Service (Parliamentary Officers) Regulations
(48th Report)

- 37 The amendment of the regulations contained in Statutory Rules 1973 No. 233, and a related amendment of the Public Service Regulations, provide that where an officer becomes critically or dangerously ill while absent from his headquarters on duty, and is visited by a close relative, the Commonwealth is liable to reimburse the relative for the cost of the travel involved. The Committee considered that the amendment was not in accordance with the statute, in that there is no provision in the Public Service Act which authorizes regulations making payments to relatives of officers.

- 38 In accordance with an undertaking given to the Committee by the Attorney-General, a Bill to amend the Public Service Act has been introduced to validate the Regulations.

A.C.T. City Area Leases Ordinance
(49th Report)

- 39 The amendment of this Ordinance contained in A.C.T. Ordinance No. 19 of 1974 provided that where a person (called the vendor) had, with the consent of the lessee of a parcel of land, entered into a contract with a person (called the purchaser) for the assignment of the lease of the land to the purchaser, and the purchaser paid to the lessee the moneys owing to the vendor under the contract and requested the lessee to assign the lease to the purchaser, the lessee should thereupon assign the lease to the purchaser. Should the lessee fail to do so, the purchaser might apply to the Supreme Court for an order that the lease be so assigned. Where the Court was satisfied that the lessee had failed to comply with the purchaser's request, it could order the assignment of the lease. The Ordinance also provided that the lessee was taken to have given consent to the contract between the vendor and the purchaser unless the contrary was proved. The Ordinance applied to all contracts whether made before or after the Ordinance came into effect.
- 40 The Committee considered that the Ordinance trespassed unduly upon the rights and liberties of citizens in that
- (a) it was expressed to be retrospective and to apply to contracts made before the Ordinance;
 - (b) it purported to bind the lessee by a contract to which he may not have been a party;
 - (c) it reversed the onus of proof;
 - (d) it ignored the contractual rights of the vendor.
- 41 The amendment made by the Ordinance was repealed by A.C.T. Ordinance No. 50 of 1974, in accordance with the undertaking given by the Minister for the Capital Territory.

D. M. Devitt
Chairman

Senate Committee Room,
5 December 1974

A P P E N D I X
(paragraph 4)

SECOND AUSTRALASIAN PARLIAMENTARY SEMINAR

October 1974

Paper presented by Senator D.M. Devitt

on

THE SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

THE SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

1. Introduction: Control of Delegated Legislation

All modern legislatures resort to the practice of authorizing delegated legislation, that is, of enacting laws empowering the executive government, or part of it, to make instruments having the force of law. Usually such instruments are for the purpose of giving effect to the policy expressed in the law under which they are made. Legislative powers may also be delegated to bodies other than the executive government, such as statutory corporations or courts.

When the practice of delegating legislative powers came into very widespread and frequent use in the early part of this century, it was criticized as a bad thing in itself, as prima facie objectionable. It is now realised, however, that not only are there very good reasons for the practice, but it would be impossible to efficiently govern a large urban industrial society without executive law-making. Indeed, a legislature which had to enact every law itself might prove unworkable; certainly it would have less time to perform its important non-legislating functions, such as debating major national issues and inquiring into social questions and the operation of the administration. The use of delegated legislation is in the interests of parliaments as well as governments.

In recent times the problem posed by delegated legislation has been seen as one of establishing controls to scrutinise the use of executive law-making. The operation of such controls has generally been seen as a job for the legislature which authorizes the making of instruments. There are other possible solutions, mainly widening the scope for judicial or quasi-judicial review of instruments. In Australia the development of controls has centred on provision for parliamentary scrutiny and action.

An important feature of federal delegated legislation in Australia is that there has not been a proliferation of different types of instruments as there has been in some other countries. Although there are a number of statutes which provide for the making of instruments other than regulations and ordinances, and although some such instruments are very numerous (for example, customs by-laws made under the Customs Act), it may accurately be said that the most important delegated legislation made under federal acts consists of regulations and ordinances, and these are currently the area of responsibility of the Senate Regulations and Ordinances Committee.

At the federal level, Australia has a highly effective system for the control of delegated legislation. This is due to two factors: there are statutory provisions which are extremely favourable to parliamentary control, and the effective operations of the Senate Committee.

Although the statutory provisions are not the central subject of this paper, they are the background against which the Committee operates, and a summary of them follows.

2. Legislative Provisions for Parliamentary Control

As regards the method of control, the only one adopted is that of disallowance by resolution of either House of the Parliament (not by both Houses, as in some States). Other methods of control, such as the affirmation or amendment of instruments by the Parliament, have not been used.

The Acts Interpretation Act in sections 48 and 49 provides for the disallowance by either House of the Parliament of all regulations made under federal statutes. The Act provides that -

(i) Regulations must be laid before each House of the Parliament within 15 sitting days of that House after the making of the regulations, and if any regulations are not so laid before each House, they shall be void and of no effect.

(ii) Either House may disallow regulations. Notice of motion for disallowance must be given within 15 sitting days after tabling of the regulations and, if such a motion is agreed to, the regulations concerned thereupon cease to have effect.

(iii) When notice of a motion to disallow regulations has been given, within 15 sitting days thereafter the House in which the notice of motion has been given must dispose of the motion (by passing or rejecting it or allowing its withdrawal), otherwise the regulations concerned shall be deemed to have been disallowed.

(iv) When a notice of motion for the disallowance of regulations has not been dealt with when the House concerned expires or is dissolved or the Parliament is prorogued, such regulations are deemed to be tabled in that House on the next sitting day of the House thereafter.

(v) No regulation the same in substance as one disallowed by either House may be made within six months after disallowance without the approval of the House concerned.

These provisions ensure that all regulations are tabled in the Parliament and that, where a notice of motion for disallowance is given, such notice of motion is completely disposed of within the stated time limit. A disallowance motion cannot be allowed to die on the Notice Paper of either House without the regulations concerned being automatically disallowed. Virtually identical provisions apply to the ordinances and regulations of most territories.

Any individual member of either House may give a notice of motion, and when a notice is withdrawn or not proceeded with, any other member may take up the motion.

The statutory provisions relating to regulations and ordinances are about as favourable to parliamentary control as they could be. The provision for automatic disallowance where a notice of motion is not disposed of particularly puts each House of the Parliament in an extremely strong position. The situation is that either House of the Parliament can veto regulations or ordinances.

One area of weakness arises from the fact that regulations and ordinances become law when they are gazetted (or on a date specified) and remain in force until such time as they are disallowed, repealed or amended. Thus a defective regulation or ordinance may remain in force for some time before the Committee can act to have it altered. This weakness is particularly evident in the case of ordinances of the Australian Capital Territory, which are virtually equivalent in content to Acts of State Parliaments. As the Law Society of the Territory has pointed out, there is a very limited opportunity for these ordinances to be subjected to scrutiny before they become law.

3. Establishment of the Regulations and Ordinances Committee

There was a great deal of discussion in legal and governmental circles in the period after the First World War of the problem of controlling delegated legislation. In 1929 the Senate appointed a select committee to consider the establishment of a standing committee system, and explicitly charged it to consider a committee on delegated legislation.

The Select Committee, having been told by several expert witnesses that some systematic control over delegated legislation was needed, and that the Senate was the appropriate body to perform this task, reported in favour of such a committee. It set out what it considered to be the role of the committee:

23. In the opinion of the Committee to work of the proposed Standing Committee on Regulations and Ordinances would be both preventive and corrective. It would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power which ought to be exercised by Parliament itself. It would be required to scrutinize regulations to ascertain:-

- (a) that they are in accord with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

24. It is conceivable that occasions might arise in which it would be desirable for the Standing Committee to direct the attention of Parliament to the merits of a certain Regulation but, as a general rule, it should be recognized that the Standing Committee would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the tests outlined above.

In 1932 the Senate adopted, after a very short debate in which the need for the proposed standing committee was generally agreed upon, a standing order giving effect to the Select Committee's recommendation. The most notable feature of the standing order was that it did not include the terms of reference suggested by the Select Committee. The Standing Order is now as follows:

36A.-(1.) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Parliament.

(2.) The Committee shall consist of seven Senators chosen in the following manner:

- (a) The Leader of the Government in the Senate shall, within four sitting days after the commencement of each Parliament, nominate,

in writing, addressed to the President, four Senators to be members of the Committee.

(b) The Leader of the Opposition in the Senate shall, within four sitting days after the commencement of each Parliament, nominate, in writing, addressed to the President, three Senators to be members of the Committee.

(c) Any vacancy arising in the Committee shall be filled after the Leader of the Government or the Leader of the Opposition as the case may be, has nominated, in writing, addressed to the President, some Senator to fill the vacancy.

(3.) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the Quorum of such Committee shall be four unless otherwise ordered by the Senate.

(4.) All Regulations and Ordinances laid on the Table of the Senate, except those of the Northern Territory and of the Territory of Papua New Guinea, shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on Motion after Notice.

The Standing Order left the Committee to determine for itself the basis upon which it would scrutinise regulations and ordinances. In a report to the Senate in 1938 (Fourth Report) the Committee stated that it had adopted the terms of reference which were suggested by the 1929 Select Committee, and which were quoted above. The Senate formally adopted this Report.

4. The Terms of Reference of the Committee

The most important consequence which arose from the decision by the Committee was that the policy of regulations and ordinances was excluded from the Committee's scrutiny, and was left to the ad hoc control of the Senate itself. The exclusion of policy from the Committee's scrutiny has allowed it to exclude politics from its deliberations and to operate on a fully non-partisan and parliamentary basis.

The 43rd Report of the Committee, presented to the

Senate in 1972, contained as an appendix a paper, which, the Report stated, was largely based upon previous reports, and which set out the way in which the Committee interpreted its terms of reference, and the types of provisions to which it had objected in the past. The Committee has disapproved of the following types of measures: provisions which are not in accordance with the spirit of the statute even though they may be legally authorized by the statute; provisions containing reversal of the onus of proof; provisions which abridge traditional civil liberties, for example by providing for searches of premises without warrant; provisions for administrative decisions affecting rights and liberties without objective criteria governing such decisions and without a right of appeal to a judicial body by an aggrieved person; retrospective provisions, particularly involving payment of moneys with long periods of retrospectivity; provisions embodying important innovations of policy, which should be provided for by substantive legislation. More specific examples of provisions objected to by the Committee will be given later in this paper.

In one special area the Committee has agreed to some relaxation of its principles. This is in relation to Norfolk Island. In 1971, after it had commented adversely on several Norfolk Island Ordinances, the Committee visited the Territory at the invitation of the Minister for External Territories and examined the peculiar problems of the community there. Subsequently the Committee resolved that when scrutinising Norfolk Island Ordinances it would have regard to the desire of the Island community to preserve its unique environment.

5. The Committee's method of Operation

In its 26th Report (1969) and the appendix to the 43rd Report the Committee acquainted the Senate with details of its method of operation. Two features of this are notable: first, the Committee receives a report upon every regulation and ordinance from its independent legal adviser (first appointed in 1945); secondly, the Committee looks at all regulations and ordinances and does not rely solely on their being drawn to its attention by the legal adviser.

The reports of the Committee, particularly the most recent ones, reveal another factor of some importance. The Standing Order clearly contemplates that the Committee report to the Senate recommending the disallowance of regulations and ordinances which it considers objectionable, and action to carry out such recommendation then depends upon the Senate. In practice, however, as the recent reports of the

In 1967 and 1968 the Committee succeeded in bringing about extensive alteration of two ordinances of Norfolk Island relating to immigration. The original ordinance provided that the administration could issue and revoke at discretion permits to enter Norfolk Island, and could deport persons whose permits had been cancelled without challenge at law. The ordinance in its final form subjected these powers to judicial review (26th Report).

In 1969 the Senate, upon the recommendation of the Committee, disallowed certain regulations relating to the armed forces on the ground that the payment of a special allowance to certain officers of the forces was a matter more appropriate to parliamentary enactment (27th Report).

Again in 1969, the Committee succeeded in having amended an ordinance of Norfolk Island which provided that a health inspector could, at his discretion, remove fixtures from certain business establishments for the purpose of enforcing health regulations. The ordinance was amended so as to subject this power to judicial review (30th Report).

In 1971 the Committee objected to an ordinance of the Australian Capital Territory which would have subjected to a penalty any person who received any of the proceeds from the improper exhibition of a restricted film. The ordinance was amended so that only the management of a theatre would be liable to such penalty (43rd Report).

Another A.C.T. Ordinance dealt with in 1971 empowered officers of the Electricity Authority to enter any leasehold and lop or remove trees which in the Authority's opinion could interfere with electrical wires. Upon the recommendation of the Committee, the ordinance was amended so as to subject this power to judicial review and to establish a right of compensation on the part of leaseholders. The Committee expressed the hope that these amendments would be an example for other similar legislation (43rd Report).

In the same year the Committee succeeded in having amended a Norfolk Island Ordinance which provided that a person could be subject to a penalty for failing to answer questions put to him by an inspector of spear guns. The Committee considered such a provision to be a violation of the normal right of an accused or suspected person to refrain from answering questions (43rd Report).

In 1973 the Committee persuaded the responsible Minister to repeal an Ordinance of the A.C.T. which prohibited

the sale of the goodwill of business premises without the approval of the Rent Controller of the Territory. The Committee considered that this provision gave to an official an arbitrary power to prohibit the sale of an item of personal property (46th Report).

The 47th Report of the Committee, which was presented to the Senate at the end of 1973, indicates that the Committee has continued its work uninterrupted since the change of government in 1972. The report indicated that a number of regulations and ordinances were amended on the recommendation of the Committee. Of particular interest was the Prices Regulation Ordinance of the A.C.T. This Ordinance was made in 1949 but had been inoperative since shortly after that time. In 1973 it was brought into operation again and was examined by the Committee. It contained provisions which the Committee regarded as unduly infringing individual rights and liberties; in particular, it conferred upon the Prices Controller of the Territory powers to enter and search premises and seize goods without a warrant, and to issue orders and directions which were placed beyond the review of the Courts. The Committee drew the attention of the responsible Minister to these provisions, and the Ordinance has now been extensively overhauled so as to provide proper safeguards for individual rights and liberties.

Since the 47th Report, a considerable number of regulations and ordinances have been amended as a result of the Committee's scrutiny, and I hope that details of these cases will be given in a further general report towards the end of the year.

Over a number of years the Committee has drawn attention to long delays in the promulgation of financial regulations relating to the Armed Services, which delays caused regulations to be made with unacceptable retrospectivity. Part of the problem consisted of delays in applying changes in Public Service pay or allowances to the Services, due to the complicated system of pay determination in the Service Departments. After constant criticism by the Committee, the system of pay determination and the Service regulations were consolidated and overhauled. The work of the Committee also led to the regulations relating to Public Service pay and allowances being overhauled.

The problem of retrospectivity was partly due to delays in drafting of regulations. The Committee has had occasion to look at the problems of the drafting service on many occasions. Although these problems go back to a shortage of trained draftsmen, in recent years successive governments have reorganised the drafting service and partly alleviated the situation.

7. Impact of the Committee

As can be seen from these examples, the Committee has in recent years received a high degree of cooperation from responsible Ministers, and it is partly due to this cooperation that its work has been so effective.

It can also be seen that the Committee has had a very large impact upon the quality and content of delegated legislation made by the Australian Government over the years. If it had not been for the scrutiny of the Committee, a large number of provisions infringing individual rights and liberties would have accumulated in the federal law of Australia. Complaints are often heard from civil liberties organizations that established rights and liberties are whittled away gradually by statutory or subordinate provisions. The Committee has largely prevented this from being done by delegated legislation in the federal sphere in Australia.

Moreover, as Senator Durack pointed out in his address to this seminar in 1972, the work of the Committee is preventive as well as curative. Departments responsible for making regulations and ordinances are known to be acutely conscious of the Committee's principles and standards when formulating legislation and in consequence have been at pains to ensure that such subordinate legislation is of a nature and quality designed to meet the high standards expected by the Committee.